

20 SCOB [2025] HCD**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)****Present:****Mr. Justice J. B. M. Hassan****And****Mr. Justice Razik Al Jalil****Writ Petitions No. 8303 of 2017, 8304 of 2017, 8305 of 2017, 8306 of 2017, 8307 of 2017, 8308 of 2017, 8309 of 2017 and 8310 of 2017.****Nazrul Islam****..... Petitioner****-Versus-****The Government of the People's
Republic of Bangladesh represented by
the Secretary, Ministry of Home Affairs
and others.**

Mr. Gazi Md. Mohsin, Advocate

... For the petitioner in all the writ
petitions.

Date of Hearing: 09-01-2023

Date of Judgment: 23-01-2023.

Mr. Golam Sarwar, Advocate

.... For the respondent No.6 in writ
petitions No. 8303 of 2017, 8304 of 2017
and 8309 of 2017.

Mr. Md. Kamrul Alam (Kamal), Advocate

...For the respondent No.6 in writ petitions
No. 8305 of 2017 and 8306 of 2017.

Mr. Tushar Kanti Roy, DAG

. . . For the State.

Editors' Note:**The facts, in their essential contour, disclose that—a series of writ petitions were instituted under Article 102(2)(b)(i) of the Constitution in the nature of habeas corpus, challenging the legality of continued detention following multiple convictions under Section 138 of the Negotiable Instruments Act, 1881. The detenu had been convicted in eight separate proceedings for dishonour of cheques, each resulting in a sentence of one year's imprisonment with fine. The judgments directed that the sentence would commence from the date of arrest or surrender. The detenu was arrested in mid-2013, and it was contended that the sentence expired in mid-2014, thereby rendering any further confinement unlawful.****The issue for determination is whether Section 397 of the Code of Criminal Procedure mandates consecutive sentences in multiple convictions, or whether the trial courts' directions fixing commencement from the date of arrest or surrender imply concurrency. The crux lies in reconciling the statutory mandate with the operative effect of judicial directions.****Key Words:**

Consecutive and Concurrent Sentences; Section 397 of the Code of Criminal Procedure, 1898; Article 102(2) (b) (i) of the Constitution

Consecutive and Concurrent Sentences under Section 397 of the Code of Criminal Procedure, 1898, in the case more than one sentence of imprisonment: —

“On a plain reading of [Section 397 of the Code of Criminal Procedure, 1898], it appears that in the case more than one sentence of imprisonment, the subsequent imprisonment shall commence after the expiration of the imprisonment to which has been previously sentenced. In other words, the sentences shall run consecutively one after another i.e the sentence being one year in each case, in 8 (eight) cases the detenu has to suffer eight consecutive years, one after another. However, in the said provision there is an exception with the words “unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence” which clearly indicate that sentences of all cases may run concurrently i.e by one year if in the subsequently judgment the Court directs as above”. ... (Para 10)

“The provision of section 397 of the Code is unambiguous and to the effect that to run the sentences concurrently there must be a clear expression as to the concurrent running of sentences with the previous sentence. But in the present judgments, we do not find such expression. Rather, the words used in the judgment are plain and simple indicating to serve it from the date of arrest or surrender for that particular sentence of imprisonment. Therefore, it cannot be said that by the judgment passed in these cases the Court below directed to run the sentences concurrently with the previous sentences. Hence, the petitioner has to serve out the sentences in all 8 (eight) criminal cases consecutively.” ... (Para 13)

JUDGMENT

J. B. M. Hassan, J.

1. The above mentioned 8 (eight) writ petitions were filed by the sole petitioner, namely, Nazrul Islam under Article 102 (2) (b) (i) of the Constitution in the form of habeas corpus writ as full brother of the detenu, namely, Md. Zahirul Haque Momin. In all the writ petitions he obtained Rules Nisi challenging detention of the detenu, Md. Zahirul Haque Momin in connection with 8 (eight) judgment and order of conviction and sentence separately passed in 8 (eight) sessions cases under section 138 of the Negotiable Instrument Act, 1881 (shortly, the NI Act). Writ petitions No. 8307 of 2017 and 8308 of 2017 having similar facts and law were heard earlier and both are fixed today for pronouncement of judgment. Similar law and facts being involved in Writ Petitions No. 8303 of 2017, 8304 of 2017, 8305 of 2017, 8306 of 2017, 8309 of 2017 and 8310 of 2017, they have also been heard together today. Now all the above mentioned 08(eight) writ petitions have been disposed of by this common judgment.

2. The detenu, Md. Zahirul Haque Momin was entangled in 08(eight) criminal proceedings under section 138 of the Negotiable Instrument Act, 1881 (the NI Act) on the allegation of dishonor of 08 (eight) cheques for different amount on different dates. Eventually, after conclusion of trial of those proceedings, the judgments and orders were passed by the learned Sessions Judge, Bogura on 26.05.2011, 26.05.2011, 30.03.2010, 31.03.2010, 04.07.2010, 26.06.2010, 26.05.2011 and 26.05.2011 in Sessions Case No. 88 of 2009, 121 of 2009, 416 of 2009, 415 of 2009, 236 of 2009, 518 of 2009, 89 of 2009 and 122 of 2009 respectively. In each case, the detenu was convicted under section 138 of the Act, 1881 and sentenced to suffer imprisonment for 01(one) year with fine.

3. Subsequently, the detenu was arrested on 17.07.2013 in connection with ST (Session Trial) Case No. 88 of 2009. In the above mentioned 8 (eight) cases the petitioner was sentenced to suffer imprisonment for one year from the date of arrest and the said period expired on 16.07.2014. Thereby, he was unauthorisedly detained from 17.07.2014. In this backdrop, the petitioner as full brother of the detenu, filed these writ petitions and obtained the present Rules Nisi.

4. Mr. Gazi Md. Mohsin, learned Advocate appearing for the petitioner in all the writ petitions submits that the detenu has been convicted under section 138 of the NI Act and sentenced in 08(eight) separate criminal proceedings and that in all the cases he was sentenced for one year each. The judgments were passed with a direction to the effect that the period of sentence shall be effective from the date of his surrender or arrest by the police, whichever is earlier. He further submits that the detenu was arrested on 17.07.2013 for serving out the sentence in connection with Sessions Case No. 88 of 2009 and then conviction warrants were issued on 05.08.2013 in 07 (seven) other Sessions Cases to serve out the sentences. Thus, in all the judgments the sentences being from the date of arrest, he was required to serve until 16.07.2014 or 04.08.2014 (from conviction warrant) i.e for one year. He also submits that although section 397 of the Code of Criminal Procedure (Cr.PC) requires to serve consecutively in respect of sentences of different proceedings but here the detenu has to serve as per direction given in the judgments effecting serving out of sentence from the date of arrest inasmuch as the direction of the judgment can not be altered or changed. In support of his submission, learned Advocate refers to the case of MA Motaleb Bhuiyan Vs. State and another reported in 18 BLC (HCD) 451.

5. Mr. Tushar Kanti Roy, learned Deputy Attorney General (DAG) appearing for the Respondent No. 1 submits that the sentences passed in different criminal proceedings shall run consecutively in accordance with section 397 of the Code of Criminal Procedure unless the Court directs that subsequent sentences shall run concurrently with such previous sentence. Since there is no direction in the judgments in question, the detenu has to serve sentences of all the judgments consecutively i.e for 8 (eight) years. In support of his submission learned DAG refers to the case of Salim Raza Vs. The State and another reported Pakistan (Lahor) 1998 Criminal Law Journal 284.

6. Mr. Golam Sarwar, learned Advocate appears for the respondent No.6 in writ petitions No. 8303 of 2017, 8304 of 2017 and 8309 of 2017. Mr. Md. Kamrul Alam (Kamal), learned Advocate appears for the respondent No.6 in writ petitions No. 8305 of 2017 and 8306 of 2017.

7. We have gone through the writ petitions, cited cases and other materials on record.

8. It appears that the detenu was convicted and sentenced in eight criminal proceedings being Sessions Cases No. 88 of 2009, 121 of 2009, 416 of 2009, 415 of 2009, 236 of 2009, 518 of 2009, 89 of 2009 and 122 of 2009 by the judgments and orders dated 26.05.2011, 26.05.2011, 30.03.2010, 31.03.2010, 04.07.2010, 26.06.2010, 26.05.2011 and 26.05.2011 respectively passed by the learned Sessions Judge, Bogura.

9. All the criminal cases were tried and disposed of separately. In each case, the conviction was under section 138 of the NI Act and sentence was to suffer imprisonment for one year alongwith fine of different amount. It is undisputed that when a person is sentenced to suffer imprisonment in different cases, the sentences shall run consecutively in accordance

with section 397 of the Code of Criminal Procedure (shortly, the Code) which runs as follows:

“397. When a person already undergoing a sentence of imprisonment, or transportation, is sentenced to imprisonment, or transportation, such imprisonment, or transportation shall commence at the expiration of the imprisonment, or transportation to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced:

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.”

10. On a plain reading of the aforesaid provision, it appears that in the case more than one sentence of imprisonment, the subsequent imprisonment shall commence after the expiration of the imprisonment to which has been previously sentenced. In other words, the sentences shall run consecutively one after another i.e the sentence being one year in each case, in 8 (eight) cases the detenu has to suffer eight consecutive years, one after another. However, in the said provision there is an exception with the words “unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence” which clearly indicate that sentences of all cases may run concurrently i.e by one year if in the subsequently judgment the Court directs as above.

11. In the present cases, there is no such direction given by the Trial Court who awarded the sentences. However, we find the ordering portion of the judgments in the following terms:

“That accused, Md. Zahirul Haque Momin (Absconding) be convicted u/s 138 of the Negotiable Instrument Act, 1881 as amended upto date and sentenced to suffer imprisonment for a term of 1(one) year and also to pay a fine of Tk./-. The period of sentence shall be effective from the date of his surrender or arrest by police whichever is earlier. Issue conviction warrant accordingly.”

12. In view of above, the period of imprisonment shall be counted from the date or his arrest or surrender before the Court, whichever is earlier. Drawing our attention to this direction, learned Advocate for the petitioner submits that it is in fact alternative words and mandate of direction as to concurrent serving out of sentences as reflected in the provision under section 397 of the Code.

13. The provision of section 397 of the Code is unambiguous and to the effect that to run the sentences concurrently there must be a clear expression as to the concurrent running of sentences with the previous sentence. But in the present judgments, we do not find such expression. Rather, the words used in the judgment are plain and simple indicating to serve it from the date of arrest or surrender for that particular sentence of imprisonment. Therefore, it cannot be said that by the judgment passed in these cases the Court below directed to run the sentences concurrently with the previous sentences. Hence, the petitioner has to serve out the sentences in all 8 (eight) criminal cases consecutively. This view of ours finds support from the case of Salim Raza Vs The State and another reported in 1998 Pakistan Criminal Law Journal (P.Cr.L.J) 284 (Lahore) relevant portions of which are as follows:

“4. I have given my anxious consideration to the arguments advanced on behalf of the parties, gone through the record, relevant provisions of Cr.PC and two precedent cases relied by the learned Additional Advocate-General, the learned counsel for the petitioner referred to section 35, Cr. P.C. The same is a relevant to the present controversy as the petitioner has been convicted at separate trials and not at same trial for two or more offences. The case covered by section 397, Cr. P.C., which reads as under:-

“Sentence of offender already sentenced for another offence.—When a person already undergoing a sentence of imprisonment (imprisonment for life) is sentenced to imprisonment or (imprisonment for life), such imprisonment or (imprisonment for life) shall commence at the expiration of the imprisonment or (imprisonment for life) to which he has been previously sentenced, unless the Court directs the subsequent sentence shall run concurrently with such previous sentence.....”

14. It is clear from the above provision that it is within the discretion of the Court passing the second conviction to make the sentence concurrent but in the absence of any direction the same shall run consecutively. In the case in hand the learned Sessions Judge was not pleased to exercise the discretion in favour of the petitioner. There is no difficulty in arriving of the conclusion from the facts record that one conviction was earlier in time and the same was followed the conviction in the other case. The trial Court has given the petitioner benefit section 382-B, Cr. P.C., therefore, it could safely be inferred that the omission or failure to make discretion about the sentence being concurrent or otherwise must be intentional. This view is supported by the observation of late Md. Justice M.R. Kiani in the case of Mian Gulzar Muhammad (supra). The relevant section reads as under:-

“...I hold that the accused was undergoing his first sentence when the second and third were pronounced on him and that consequently, where there is nor order making them concurrent, they will be undergone consecutively. The petition is dismissed.”

15. We have also gone through the case reported in 18 BLC (HCD) 451 cited by the learned Advocate for the petitioner wherein the High Court Division held that judgment can not be changed, revised or reviewed and after pronouncement of judgment the Court becomes functus-officio. The ratio was laid down in hearing of an application for recalling previous judgment and order passed in the absence of the petitioner but the present case having distinct facts, the cited case is not applicable.

16. In view of above discussions, we do not find any merit in these Rules Nisi.

17. In the result, the Rules Nisi issued in Writ Petitions No. 8303 of 2017, 8304 of 2017, 8305 of 2017, 8306 of 2017, 8307 of 2017, 8308 of 2017, 8309 of 2017 and 8310 of 2017 are discharged without any order as to costs.

18. The petitioner is directed to surrender before the Court below to serve out the remaining sentences, if those are not interfered by any higher forum.

19. Communicate a copy of this judgment and order to the respondents at once.